# STATE OF MICHIGAN

# COURT OF APPEALS

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| GRAND VALLEY HEALTH CORPORATION and GRAND VALLEY HEALTH MANAGEMENT, INC., | UNPUBLISHED January 27, 2011 |
| Plaintiffs-Appellants, | |
| v | No. 292446 Kent Circuit Court LC No. 09-001346-CK |
| ETHOSPARTNERS HEALTHCARE MANAGEMENT GROUP, INC., MARTY ROSENBERG, PATRICK REID, JAMES E. BAKEMAN, M.D., and DONALD R. BOHAY, M.D., | |
| Defendants-Appellees. | |

Before: MARKEY, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's June 5, 2009 opinion and order granting defendants summary disposition. We affirm.

We review a "decision on a motion for summary disposition de novo." *Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 474; 760 NW2d 526 (2008). Defendants were granted summary disposition, pursuant to MCR 2.116(C)(8), on all of plaintiff's claims. A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Dolan v Continental Airlines*, 454 Mich 373, 380; 563 NW2d 23 (1997). "A movant is entitled to summary disposition under MCR 2.116(C)(8) if 'the opposing party has failed to state a claim on which relief can be granted.' MCR 2.116(C)(8)." *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

"To maintain a cause of action for tortious interference, the plaintiffs must establish that the defendant was a 'third party' to the contract or business relationship." *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). In addition, "[i]t is now settled law that corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the

corporation." *Id*. Moreover, as stated by the Court in *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 593; 683 NW2d 233 (2004), when an agent acts within the scope of its authority as an agent, the agent is not a third party for purposes of a tortious interference claim. Hence, it follows that when an agent acts solely for its own benefit, the agent is not acting within the scope of its authority. *Lawsuit*, 261 Mich App at 593; *Reed*, 201 Mich App at 13.

Based on the allegations in the complaint, defendants EthosPartners Healthcare Management Group, Inc., Marty Rosenberg, and Patrick Reid were managers of Orthopaedic Ventures, L.L.C. (OV) and Orthopaedic Associates of Michigan, P.C. (OAM), Rosenberg and Reid were officers of OAM, and EthosPartners, Rosenberg, and Reid were management agents of all of the physicians who changed their referral patterns. As such, EthosPartners, Rosenberg, and Reid were clearly agents of OV, OAM, and all the physicians who changed their referral patterns. See *Stephenson v Golden*, 279 Mich 710, 734-735; 276 NW 849 (1937); *Reed*, 201 Mich App at 13. In addition, Drs. Bakeman and Bohay were agents of OV because they were owners and members of OV as well as managed and represented OV. See *Stephenson*, 279 Mich at 734-735; *Lawsuit*, 261 Mich App at 593. Moreover, Drs. Bakeman and Bohay were also agents of OAM because they were members and owners of OAM.

Because all of defendants were agents of OV and OAM, they were "not liable for tortious interference . . . unless they acted solely for their own benefit with no benefit to" their principal. *Reed*, 201 Mich App at 13; see also *Lawsuit*, 261 Mich App at 593. The complaint alleged that the egregious conduct of the "defendants," which includes Drs. Bakeman and Bohay because they were listed defendants in the complaint, was done solely, substantially, or, in part, to obtain a financial windfall not only for defendants, but also for the physicians affiliated with OAM and OV. Consequently, defendants did not act solely for their own benefit, but rather acted for the benefit of the physicians of OAM and OV as well. *Reed*, 291 Mich App at 13. Accordingly, we reject plaintiff's argument that it should have been presumed that defendants were acting outside the scope of their authority due to the fact that plaintiff alleged unlawful conduct. *Lawsuit*, 261 Mich App at 593; *Reed*, 201 Mich App at 13. Based on the foregoing, defendants were entitled to summary disposition because they were alleged to be agents who were acting within the scope of their authority and not acting solely for their own benefit. *Lawsuit*, 261 Mich App at 593; *Reed*, 201 Mich App at 13. Accordingly, defendants could not be considered third parties for purposes of plaintiff's tortious interference claims. *Lawsuit*, 261 Mich App at 593. Hence, contrary to plaintiff's assertions on appeal, no factual development could justify recovery. *Wade*, 439 Mich at 163; *Lawsuit*, 261 Mich App at 593.

In addition, plaintiff argues that summary disposition was not proper because a trier of fact, and not the trial court, needs to determine whether an agent acts within the scope of his or her authority. We find that this argument has no merit. In *Stack v Marcum*, 147 Mich App 756, 759-760; 382 NW2d 743 (1985), we concluded that summary disposition was not proper because it is for the fact-finder to conclude whether an agent is acting within the scope of his or her agency. *Stack* was issued before November 1, 1990, and thus is not binding precedent. MCR 7.215(J)(1). In addition, we have repeatedly granted summary disposition to a defendant without leaving it to the fact-finder to determine whether the agent was acting within the scope of his agency when the conduct was performed. See *Lawsuit*, 261 Mich App at 593; *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 657; 513 NW2d 441 (1994); *Reed*, 201 Mich App at 13. Based on the allegations contained in the complaint, we conclude that there is no reason to leave

to a trier of fact the determination whether defendants were acting within the scope of their authority. *Lawsuit*, 261 Mich App at 593; *Reed*, 201 Mich App at 13; *Stack*, 147 Mich App at 760-761 (Kelly, J, dissenting).

Plaintiff next argues that it pled a cognizable claim for tortious inducement of breach of fiduciary duty. Thus, the trial court erred when it dismissed plaintiff's claim. In this case, no cases or statutes were cited by plaintiff where Michigan has recognized this cause of action. Although plaintiff references *LA Young Spring & Wire Corp v Falls*, 307 Mich 69, 105-108; 11 NW2d 329 (1943), and *NM Holdings, Co, LLC v Deloitte & Touche LLP*, unpublished opinion, issued June 15, 2009 (ED Mich, Case No. 08-14567), in support of its proposition, the claims in those cases did not include a claim for tortious inducement of a breach of fiduciary duty. *Id*.; *LA Spring*, 307 Mich at 105-108. Accordingly, we conclude that tortious inducement of breach of fiduciary duty claim is not a recognized cause of action in Michigan, and the trial court correctly disposed of the claim by summary disposition.

Plaintiff also argues that it pled a cognizable prima facie tort claim. Thus, the trial court erred when it dismissed plaintiff's claim. However, plaintiff, again, does not provide any Michigan case or statute to support its claim. Plaintiff cites *Wilkinson v Powe*, 300 Mich 275, 282; 1 NW2d 539 (1942), to support its position. However, the Court in *Wilkinson* merely provided what would be required to present a prima facie case in a tortious interference with a contract case, which was the cause of action which existed in *Wilkinson*. *Id*. at 278-286. Hence, the Court in *Wilkinson* did not create a cause of action for "prima facie tort." *Id*. Based on the foregoing, we conclude that the trial court correctly granted defendants summary disposition on plaintiff's "prima facie tort" claim because it is not a cognizable claim.

Because, as plaintiff recognizes, claims for conspiracy and aiding and abetting cannot survive separately from an independent, actionable tort, and all of plaintiff's claims were properly dismissed, as set forth above, we conclude that the trial court correctly granted defendants summary disposition on plaintiff's conspiracy and aiding and abetting claims. See e.g. *Fenestra, Inc v Gulf American Land Corp*, 377 Mich 565, 594; 141 NW2d 36 (1966); *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

Finally, plaintiff argues that the trial court abused its discretion when it did not grant plaintiff the opportunity to amend its complaint where bad faith cannot be reasonably inferred from the bare allegations of the complaint. The decision to grant or deny leave to amend is within the trial court's discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). We "will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of discretion that resulted in injustice." *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006). An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008).

If a motion for summary disposition is based on subrule (C)(8), (9), or (10), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). Here, plaintiff requested to amend its complaint in order to assert that defendants alleged wrongful acts were outside the scope of their authority as agents. Plaintiff attached the

operating agreement to the complaint as an exhibit and the trial court correctly considered this evidence in ruling on plaintiff's motion. MCR 2.113(F)(1). As mentioned, at the summary disposition hearing, plaintiff failed to indicate that defendants were acting solely for their own benefit. Further, even at oral argument, plaintiff only requested that the complaint be clarified in regard to defendants' bad faith. However, even if the allegations were clarified as proposed by plaintiff, there still remains no evidence from which plaintiff could articulate that defendants acted solely for their own benefit. *Lawsuit*, 261 Mich App at 593; *Reed*, 201 Mich App at 13. In this regard, plaintiff failed to offer adequate justification to amend the pleadings. *Weymers*, 454 Mich at 659. In addition, no injustice resulted by the trial court's denying plaintiff's request for leave to amend its complaint because such an amendment would have been futile. *Lewandowski v Nuclear Mgt Co, LLC,* 272 Mich App 120, 126-127; 724 NW2d 718 (2006); *PT Today,* 270 Mich App at 142.

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Pat M. Donofrio